No. 2503

7

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

A. B. HAMMOND,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

In Error to the District Court of the United States for the Southern Division of the Northern District of California.

PETITION FOR REHEARING

FRANK HALL,
Attorney for Petitioner.

Filed this .....day of November, 1917.

FRANK D. MONCKTON, Clerk,

By .....FILED....., Deputy Clerk.

NOV 24 1917

F. D. MONCKTON,

NEAL PUB. CO. PRINT.

No. 2503.

United States Circuit Court of Appeals

For the Ninth Circuit

A. B. HAMMOND,
Plaintiff in Error,
vs.
UNITED STATES OF AMERICA,
Defendant in Error.

PETITION FOR REHEARING

Comes now the United States of America, defendant in error, and prays that a rehearing may be granted in said case and the decision and opinion of the Court recalled because of error believed to exist therein, upon the grounds and because of the errors hereinafter set forth.

I.

The Court erred in holding that the exception interposed to the instructions of the trial court on the measure of damages was sufficiently specific to direct the attention of the Court to the errors complained of. In instructing the jury with respect to the amount of the verdict in the event it found the defendant was liable as a wilful trespasser, the Court said:

> "If, under the principles I have stated, you find that the defendant, or any of the corporations named acting under his direction and control, knowingly and wilfully cut and converted the timber mentioned in the complaint, or any part thereof, then the plaintiff is entitled to recover the market value of the timber so converted in whatever condition or form it may have been at the time of its disposal or sale."

In instructing the jury on the measure of damages applicable in the event it was determined that the defendant was an innocent trespasser, the Court said:

> "If you find that the defendant, or any of the said corporations while acting under his direction and control, converted the timber mentioned in the complaint, or any part thereof, under the honest but mistaken belief that he or they had the right under the law to cut and remove such timber, then in assessing the damages you will fix the value of the same at the time of conversion less the amount which was added to its value before sale; in other words, if you find that timber was cut and removed from lands of complainant and that there was added thereto certain value by reason of the manufacturing of said timber into lumber for the market, then the measure of damages will be the difference between the expenses incurred in the manufacturing of said lumber and the price for which it was sold in the market."

The objection interposed by counsel for the de-

fendant to the instructions given by the Court on the measure of damages is as follows:

> "Mr. Wheeler. Next, as to the measure of damages. We except as to the measure suggested by the Court. We claim that the only measure that can exist under the circumstances is the value of the stumpage in the tree, and I think your Honor's instructions add to it another element."

It will thus be seen that the Court's instructions on the measure of damages embraced at least two elements, and as counsel for the plaintiff in error would have the Court believe, three elements. The exception in no manner indicates which feature was objectionable to counsel. The language used merely indicates that counsel had some other and different views from those expressed by the Court. He indicated that he thought the only measure of damage that could exist under the circumstances was the value of the timber in the tree and that the instructions added another element thereto. It is clear indeed that the instructions of the Court did add another element thereto, and especially so if the jury found that the plaintiff in error was guilty of a wilful trespass, for the Court expressly instructed the jury in that event that it could return a verdict for the full manufactured value of the lumber. It cannot be said that counsel for the plaintiff in error was not advised of the claims being made by the Government, for the pleadings clearly and specifically set forth the value of the

timber in all its conditions from the time it was standing in the tree until it was manufactured and disposed of as alleged. Neither does the exception nor the record itself disclose any attempt on the part of counsel to correctly inform the Court of his views, nor even to ask the Court to give the instruction which this Court has said in its opinion was the proper one. The courts have repeatedly condemned such practice, and we now submit that the present interpretation placed upon the language used by counsel in this exception is not in accord with the decision of this and other courts. The thoroughly established rule as announced by the decisions is that if counsel desire any instruction given or wishes to oppose any instruction given by the Court, they must point out specifically wherein the Court has erred in the instruction already given or submit to the Court the proper instruction, but such was not done in this case. He did not give the trial court the benefit of his views and it was not advised of the fact that he claimed as error the giving of the instruction to which objection is now made.

In this Court counsel has strenuously insisted that the evidence failed to show that the plaintiff in error was liable as for a wilful trespass and the language used in this exception may at least equally well be construed to say that he was there attempting to object to the Court giving any instruction based upon the theory that the trespass was wilful.

It is respectfully submitted that the Court's in-

terpretation of the language used in the exception is not in accord with the opinion of the Supreme Court of the United States in the case of *United States vs. U. S. Fidelity & G. Co.,* 236 U. S. 512, where it was said:

> "The primary and essential function of an exception is to direct the mind of the trial judge to a single and precise point in which it is supposed that he has erred in law, so that he may reconsider it and change his ruling if convinced of error, and that injustice and mistrials due to inadvertent errors may thus be obviated. An exception, therefore, furnishes no basis for reversal upon any ground other than the one specifically called to the attention of the trial court."

In the case of *McDermott vs. Severe,* 202 U. S. 598, 611, the court said:

> "If the defendant wished the charge modified in this respect, he should have called the attention of the court directly to this feature."

We earnestly insist that the language used by counsel in his exception to the instructions of the Court neither pointed out the precise matter which was objectionable, nor did it with that fairness which the courts demand indicate the correct instruction which the Court should have given.

In its opinion this Court has cited the case of *Sam Wick vs. United States,* 240 Fed. 60, 65. In this case the instruction excepted to in general lan-

guage contained but one element and did not, as in the case at bar, contain a number of different and distinct elements. We have no complaint to make against the Court's finding in the case last cited, that a general exception to an instruction containing one element will be sufficient, but we do say that in the present case the general exception made by counsel was not sufficient to advise the trial court of the alleged errors of which he now complains, and we submit that there was nothing in the language of this exception which afforded the Court an opportunity to correct or modify its instruction. In the case of *McDermott vs. Severe,* 202 U. S. 600, 610, the court said:

> "A number of the rules of damages laid down in this charge were unquestionably correct; to which no objection has been or could be successfully made. In such cases it is the duty of the objecting party to point out specifically the part of the instructions regarded as erroneous. * * * It would be very unfair to the trial court to keep such an objection in abeyance, and urge it for the first time in an appellate tribunal."

See also *Mobile, etc., vs. Jurey,* 111 U. S. 584, 596.

Jacobs vs. Southern R. Co., 241 U. S. 229, 237.

Illinois C. R. Co. vs. Skaggs, 240 U. S. 66, 71-74.

And in the case of the *United States vs. U. S. Fidelity & G. Co., et al., supra,* the court said:

> "An exception, therefore, furnishes no basis for reversal upon any ground other than the one specifically called to the attention of the trial court."

As expressed in the exception in the instant case, counsel indicated to the Court that he thought the only instruction that should be given should limit the recovery to the value of the timber before severed. Such a measure of damages has not been upheld by the courts and is specifically repudiated in this Court's opinion in this case. If the present judgment of this Court is allowed to stand, it therefore follows that the Court has not only rewarded counsel for failure to fairly enlighten the trial court, but has rewarded him for attempting to induce the trial court to give an instruction which in the most favorable light would have been erroneous.

II.

The Court erred in holding that the exception interposed to the instruction of the trial court on the question of interest was sufficiently specific to direct the attention of the Court to the error complained of. The Court instructed the jury as follows:

> "In fixing the amount of any verdict you may find for the plaintiff, you should include interest on the value of any lumber so converted from the date of such conversion to the present time."

At the close of the Court's instructions, the following colloquy between Court and counsel occurred:

"BY THE COURT: Have counsel any suggestions to make?

MR. HALL: I have no exceptions, but I merely suggest at this time that the rate of interest should be stated to the jury by the Court.

THE COURT: The rate of interest is the legal rate of 7%."

In saving his exception to the Court's instruction counsel said:

"I also except to your Honor's instructions with regard to interest."

As indicated by the trial judge in passing upon the motion for a new trial (*United States vs. Hammond,* 226 Fed. 849), the instruction on interest contained two elements: (1) the right to interest; (2) the rate of interest. And counsel did not indicate in his exception which portion of the instruction was objectionable. Here, again, we invite the Court's attention to the cases already cited in this petition and in the brief heretofore filed, to the effect that the instruction complained of contained more than one element, and that where such is the case a general exception is not sufficient. Counsel for the plaintiff in error has contended in this court, and this court has held, that in cases of this sort the question of interest is discretionary with the jury, but he did not accord the trial court the opportunity to submit the question to the discretion of the jury, but remained silent, and now for the first

time in this Court says that the trial Court erred in not so doing.

For the reasons and upon the grounds above set forth, it is respectfully urged that a rehearing be granted in this cause; that the opinion heretofore filed be withdrawn; and that the judgment of the court below be affirmed.

FRANK HALL,
Attorney for Defendant in Error.

I hereby certify that the foregoing petition for rehearing is, in my judgment, well founded and is not interposed for delay.

FRANK HALL,
Attorney for Defendant in Error.